RECORD AND BRIEF

No. 15-1256

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In the Supreme Court of the United States

SHANNON NELSON and LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONERS

FRED A. ROWLEY, JR.
DANIEL B. LEVIN
Munger, Tolles & Olson LLP
355 S. Grand Ave.
Los Angeles, CA 90071

DOUGLAS K. WILSON
NED R. JAECKLE
Office of the State Public Defender
1300 Broadway, Ste. 300
Denver, CO 80203

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

SUZAN TRINH ALMONY
P.O. Box 1026
Broomfield, CO 80038

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. Colorado is depriving petitioners of their property without due process. 1

A. The money at issue belongs to Nelson and Madden, not to Colorado. 1

B. The Exoneration Act is not an adequate procedure for refunding money to appellants upon the reversal of their convictions. 3

II. Colorado's scheme is contrary to due process under any standard. 9

A. Colorado's scheme fails the *Medina* standard. 9

B. Colorado's scheme fails the *Mathews* standard. 12

III. Colorado's remaining arguments are incorrect. 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U.S. 134 (1919) 2
Atlantic Coast Line R. Co. v. Florida, 295 U.S. 301 (1935) 8
Atlantic Richfield Co. v. District Ct., 794 P.2d 253 (Colo. 1990) 2
Bennis v. Michigan, 516 U.S. 442 (1996) 11
Brantley v. State, 769 N.E.2d 676 (Ind. Ct. App. 2002) 14
Brown v. Detroit Trust Co., 193 F. 622 (6th Cir. 1912) 5
Callahan v. Sanders, 339 F. Supp. 814 (M.D. Ala. 1971) 6
Carver v. United States, 111 U.S. 609 (1884) 6
City of Hazleton v. Birdie, 10 Kulp 98 (Pa. C. 1900) 6
City of Miami v. Keton, 115 So. 2d 547 (Fla. 1959) 6
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 2
Denver & S.L.R. Co. v. Chicago, B. & Q.R. Co., 185 P. 817 (Colo. 1919) 2
Ex parte Morris, 76 U.S. 605 (1869) 5
Herndon v. Superintendent, 351 F. Supp. 1356 (E.D. Va. 1972) 4
In re Winship, 397 U.S. 358 (1970) 11
Jackson v. Virginia, 443 U.S. 307 (1979) 11
Lawson v. United States, 397 F. Supp. 370 (N.D. Ga. 1975) 5
Mathews v. Eldridge, 424 U.S. 319 (1976) 9, 12, 13
Medina v. California, 505 U.S. 437 (1992) 9, 10

Patterson v. New York, 432 U.S. 197 (1977) 9
People v. Bandy, 239 Ill. App. 273 (Ill. App. Ct. 1925) 6
State v. Minniecheske, 590 N.W.2d 17 (Wis. Ct. App. 1998) 4, 14
Toland v. Strohl, 364 P.2d 588 (Colo. 1961) 7
United States v. Gettinger, 272 U.S. 734 (1927) 5
United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 9
United States v. Morgan, 307 U.S. 183 (1939) 8
United States v. Mossew, 268 F. 383 (N.D.N.Y. 1920) 5
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 2
White v. City of Tifton, 57 S.E. 1038, 1039 (Ga. Ct. App. 1907) 6

STATUTES

Colo. Rev. Stat. §§ 13-65-102(2)(a)(I) and (II) 3

OTHER AUTHORITY

Right to Recover Back Fine or Penalty Paid in Criminal Proceeding, 26 A.L.R. 1523 (1923) 6

REPLY BRIEF FOR PETITIONERS

The money at issue in this case is the property of Shannon Nelson and Louis Madden. Once their convictions were reversed, Colorado's right to the money evaporated. Colorado does not claim to have any property interest in the money or even any interest in preventing Nelson and Madden from getting it back.

By placing an impossibly high procedural hurdle between petitioners and their property, for no apparent reason, Colorado is literally depriving them of property without due process.

I. Colorado is depriving petitioners of their property without due process.

Colorado spends much of its brief (Resp. Br. 13-23) responding to a substantive due process argument we do not make. Our argument sounds in *procedural* due process. Where a state is holding property that belongs to one of its citizens, the state must provide a procedure that is adequate to return the property.

A. The money at issue belongs to Nelson and Madden, not to Colorado.

Colorado errs in arguing (Resp. Br. 13) that our "asserted substantive right is founded in the Due Process Clause." In fact, it is founded in state property law. There is no doubt that the money at issue belongs to Nelson and Madden, not to Colorado. When the judgments in Colorado's favor were reversed, there was no longer any legal basis for the payments. The money became the property of

Nelson and Madden. Governments that obtain money pursuant to judgments of conviction do not get to keep the money when those judgments are reversed, because the money is no longer their property.

This proposition is almost too obvious to need stating. It is as true in Colorado as it is in every other state. *See, e.g.*, *Atlantic Richfield Co. v. District Ct.*, 794 P.2d 253, 257 (Colo. 1990) (discussing "the principle 'long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby.'") (quoting *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919)); *Denver & S.L.R. Co. v. Chicago, B. & Q.R. Co.*, 185 P. 817, 820 (Colo. 1919) ("The law is unquestioned that a party procuring a reversal of an erroneous judgment is entitled to restitution.").[1]

The Colorado Supreme Court thus decided this case on the assumption that Nelson and Madden had established a property interest in having their money refunded. Rather than dwelling on that question, the court proceeded straight to the

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[1] The state wisely does not claim that the contours of property rights in Colorado are defined by the procedure provided in the Exoneration Act. Such a claim would be foreclosed by *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty."). *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property").

question of whether the Exoneration Act provides sufficient process for defendants to recover the money. Pet. App. 22a. The dissenting judge below likewise assumed that the money at issue is the "defendant's money," Pet. App. 26a, not the state's.

It would be almost unthinkable for a state to claim ownership of money paid pursuant to convictions that have been reversed. That would be tantamount to charging defendants for the privilege of being tried unlawfully. Fortunately, Colorado has not made any such claim. Colorado does not dispute that the money at issue belongs to Nelson and Madden.

B. The Exoneration Act is not an adequate procedure for refunding money to appellants upon the reversal of their convictions.

The Exoneration Act is not an adequate procedure for returning money to prevailing appellants upon the reversal of a conviction. The Act was not intended to serve this purpose. Pet. Br. 2-8. The procedure provided by the Act is of no use to the vast majority of prevailing appellants. Pet. Br. 9-11. The Exoneration Act virtually ensures that the state will keep money that is undisputedly the property of Nelson and Madden.[2]

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[2] The Exoneration Act may be an even higher barrier than we described in our opening brief. At Pet. Br. 6-7, we construed §§ 13-65-102(2)(a)(I) and (II) to require, paradoxically, that the ground for reversal be unrelated to the defendant's actual innocence. We have since realized that these provisions may be even more paradoxical than that. The phrase "other than" may

Because the reversal of a judgment means the appellee no longer has any property interest in money paid pursuant to that judgment, the normal practice has been for governments to refund payments pursuant to convictions when the convictions are reversed. Pet. Br. 26-30; NACDL Br. 4-20. Indeed, it would be shocking if normal practice were otherwise. Colorado claims (Resp. Br. 18-22) to have found several examples to the contrary. But Colorado misunderstands the cases it cites. In these cases, where courts refused to refund payments upon the reversal of a conviction, it was for case-specific reasons that are not present here and that do not contradict the general practice of providing refunds.

In two of Colorado's cases, courts decided merely that habeas corpus is the wrong vehicle for seeking the recovery of payments, not that such payments are unrecoverable. *State v. Minniecheske*, 590 N.W.2d 17, 19 (Wis. Ct. App. 1998) ("A petition for a writ of habeas corpus is designed to challenge the taking of a person's liberty, not to obtain a money judgment."); *id.* at 21 ("[W]e agree with Minniecheske that there must be a remedy that can enable him to successfully recover the money the State improperly seized."); *Herndon v. Superintendent*, 351 F. Supp. 1356, 1358 (E.D. Va. 1972) ("The issue remains, therefore, whether habeas corpus relief can be applied for the return of fines levied and collected by virtue of an unlawful conviction. The Court con-

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modify both "legal insufficiency of evidence" *and* "legal error unrelated to the petitioner's actual innocence." If so, these provisions bar petitions from defendants whose convictions were reversed for *any* reason, whether insufficiency of evidence or an error unrelated to innocence.

cludes that it cannot."); *id.* at 1360 ("Were this a state appellate court, the result might be different."). In another of Colorado's cases, a court determined merely that a specific fine could not be recovered under a specific federal code section. *United States v. Mossew*, 268 F. 383, 384 (N.D.N.Y. 1920) ("this section is not applicable to the remissions of a fine in the case at bar").

In one of Colorado's cases, this Court found that a refund claim had been expressly waived by the defendants' plea of nolo contendere. *United States v. Gettinger*, 272 U.S. 734, 735 (1927). In another, the statute of limitations for recovering payments had expired. *Lawson v. United States*, 397 F. Supp. 370, 372 (N.D. Ga. 1975). In another, a Court of Appeals expressly avoided deciding the issue, on the ground that refunding a fine was a matter for the District Court. *Brown v. Detroit Trust Co.*, 193 F. 622, 626 (6th Cir. 1912) ("Without deciding that on reversal of the contempt order restitution of the fine paid could be enforced under the Tucker act ... we are of opinion that *this* court has no authority to direct restitution") (emphasis added). And in one, this Court, after reversing the District Court's judgment, actually ordered the District Court "to cause restitution to be made to the appellants of whatever they have been compelled to pay under that decree." *Ex parte Morris*, 76 U.S. 605, 605-06 (1869) (internal quotation marks omitted).

In the remaining cases cited by Colorado, fines were not refunded because the defendants had paid the fines voluntarily as settlements, to avoid other penalties such as incarceration or fines in a greater

amount. *People v. Bandy*, 239 Ill. App. 273, 277-78 (Ill. App. Ct. 1925) ("The test by which the right of recovery is determined seems to be whether the payment can be said to have been a voluntary or an involuntary one. ... [W]here a fine has been paid under the advice of counsel in order to settle the case or to avoid penalties for other offenses or the trouble and expense of an appeal, the payment is said to be a voluntary one."); *Carver v. United States*, 111 U.S. 609, 612 (1884) (fine not refunded because defendant "voluntarily conceded that there was justly due from him to the government a larger sum than he had paid"); *City of Miami v. Keton*, 115 So. 2d 547, 551 (Fla. 1959) ("payment is voluntary and cannot be recovered"); *White v. City of Tifton*, 57 S.E. 1038, 1039 (Ga. Ct. App. 1907) (payment was "voluntary in the legal sense of that word"); *Callahan v. Sanders*, 339 F. Supp. 814, 818 (M.D. Ala. 1971) ("It has long been settled that when one pays a fine voluntarily under a mistake of law, that fine cannot be recovered."); *City of Hazleton v. Birdie*, 10 Kulp 98, 99 (Pa. C. 1900) ("if the payments were voluntarily made by the defendant then he would not be entitled to restitution"). *See generally Right to Recover Back Fine or Penalty Paid in Criminal Proceeding*, 26 A.L.R. 1523, § II.b.1 (1923) ("money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance") (internal quotation marks omitted); *cf. id.* § I (by contrast, where the payment was "an involuntary one, the fine may generally be recovered").

Needless to say, none of the unusual circumstances present in Colorado's grab-bag of cases is present in our case. Shannon Nelson and Louis Madden properly sought refunds from the courts in which they were convicted, not through some inappropriate procedure such as habeas corpus. They did not waive the right to seek refunds or wait too long. They certainly did not make payments to the state voluntarily; the payments were compelled by the now-reversed judgments of conviction. Colorado is simply incorrect in denying the existence of a traditional practice of refunding money upon the reversal of a judgment. Colorado itself followed that traditional practice until this case. *See Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (after reversing a conviction, ordering that "the parties be placed in *status quo* by refund to the defendant of the sums paid as fine and costs").

Colorado errs further in suggesting (Resp. Br. 18-20) that sovereign immunity bars Nelson and Madden from recovering the money they paid pursuant to their now-reversed convictions. Nelson and Madden are not suing the state. It was the state that filed suits against Nelson and Madden, when it charged them with crimes. Now that the judgments in those cases have been reversed, the money that belongs to Nelson and Madden should be returned to them. Sovereign immunity has never been thought to interfere with such refunds, which governments have routinely been providing to successful appellants for centuries.

To be sure, as Colorado observes (Resp. Br. 21 n.7), courts have discretion to refuse a *complete* re-

fund upon the reversal of a judgment, where a complete refund would be inequitable. The Court has noted: "Decisions of this court have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error." *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 309 (1935). The Court continued: "But the rule, even though general in its application, is not without exceptions," because restitution is "a remedy which is equitable in origin and function." *Id. See also United States v. Morgan*, 307 U.S. 183, 197 (1939) ("What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution."). The Court provided an example in *Atlantic Coast Line* of a circumstance in which a complete refund would not be equitable. Where an insurance company overpaid a claimant because the claimant exaggerated the amount of the loss, the insurance company could recover only the amount of the overpayment, not the complete amount it had paid to the claimant. *Atlantic Coast Line*, 295 U.S. at 310.

In our case, however, there are no equitable considerations that would justify a less-than-full refund. Colorado does not even argue that equitable considerations require the state to keep any of the money that belongs to Shannon Nelson and Louis Madden. Such an argument would be frivolous. Colorado took their money pursuant to judgments that have now been reversed. This is petitioners' money, not Colorado's.

II. Colorado's scheme is contrary to due process under any standard.

Colorado argues (Resp. Br. 23-26) that its scheme should be evaluated under the standard of *Medina v. California*, 505 U.S. 437 (1992), rather than that of *Mathews v. Eldridge*, 424 U.S. 319 (1976). This argument is incorrect. The Exoneration Act is a civil remedy. *Mathews* is the appropriate standard for evaluating whether civil processes comport with due process. *See, e.g., United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). The *Medina* standard applies only to procedural rules that "are part of the criminal process." *Medina*, 505 U.S. at 443. The Exoneration Act is not part of the criminal process. *Mathews* thus provides the appropriate standard.

But it makes no difference which standard the Court uses. Colorado's scheme is an egregious denial of due process under any standard.

A. Colorado's scheme fails the *Medina* standard.

Under *Medina*, a procedure violates due process where it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505 U.S. at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). Colorado's scheme offends such a principle. Stated narrowly, the principle is that upon the reversal of a judgment, the appellant is entitled to a refund of money she paid pursuant to that judgment. Stated broadly, the principle is that a state may not deliberately keep property that belongs to one of its

citizens. "Historical practice is probative of whether a procedural rule can be characterized as fundamental." *Medina*, 505 U.S. at 446. In both versions, this principle has been followed for centuries. It is as deeply rooted and fundamental as any principle of justice could be.

In arguing otherwise, Colorado repeatedly (e.g., Resp. Br. 26) mischaracterizes the relief petitioners seek as a "monetary judgment against the State." Petitioners are not seeking any kind of judgment against the state. Petitioners already have judgments in their favor, in criminal cases brought against them by the state. Petitioners won. Yet the state is holding on to their money as if they lost.

Rather than assessing the effect of its scheme as a whole, Colorado divides the scheme into parts (Resp. Br. 27-29), and argues that each individual part satisfies the *Medina* standard. But Colorado is mistaken even here.

First, Colorado errs in suggesting (Resp. Br. 27-28) that actual innocence is an appropriate prerequisite for the recovery of money paid pursuant to a conviction that has been reversed. Colorado collects this money only from people against whom the state obtains a judgment of conviction. Without a judgment of conviction, the state has no basis for keeping its citizens' money.

Second, Colorado errs in contending (Resp. Br. 28-29) that due process permits the burden of proof to be placed on petitioners, on the theory that defendants seeking the reversal of convictions must prove that errors occurred at trial. But we are long past that stage of the proceedings. Petitioners' convictions

have already been reversed. Colorado has taken money from Nelson and Madden in their criminal cases, money the state takes only pursuant to convictions, but Nelson and Madden stand convicted of no crime. In effect, Colorado is requiring Nelson and Madden to prove their innocence in order to avoid criminal penalties. But the Due Process Clause places the burden of proof on the state. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 309 (1979).

In a footnote at the end of its brief (Resp. Br. 42 n.20), Colorado analogizes its scheme to civil forfeiture, but the analogy is a very poor one. Unlike civil forfeitures, which states often collect without obtaining a criminal conviction, the money at issue in our case is collected by the state *only* pursuant to a criminal conviction. When a conviction is reversed, the state loses any basis for keeping the money. Unlike forfeited assets, which must be the proceeds or instrumentalities of crime, the money at issue in our case was neither. Moreover, to the extent there are any due process limits on civil forfeitures unconnected to criminal convictions, those limits are derived primarily from traditional practices associated with civil forfeiture, which has its own unique history. *Bennis v. Michigan*, 516 U.S. 442, 453 (1996); *id.* at 454 (Thomas, J., concurring). Likewise, the due process limits relevant to the reversal of judgments are derived primarily from traditional practices associated with the reversal of judgments, a topic with a history of its own. That history is very clear: For centuries, a prevailing appellant has been entitled to get her money back. A decision in our case thus need not have any implications for civil forfeitures.

Third, Colorado errs in arguing (Resp. Br. 29-30), that due process permits the state to require defendants to prove their actual innocence by clear and convincing evidence, on the theory that the clear and convincing standard is used in other areas of law such as habeas corpus. But no American jurisdiction has ever used the standard in *this* area, until this case. Indeed, so far as we are aware, Colorado is the first jurisdiction to require successful appellants to prove their innocence by *any* standard to get their money back when their convictions are reversed.

B. Colorado's scheme fails the *Mathews* standard.

Colorado's scheme also fails the *Mathews v. Eldridge* test. The state's contrary view (Resp. Br. 30-36) rests on a misunderstanding of the test's three factors.

The first *Mathews* factor is "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. In our case, that interest is the property right that Nelson and Madden have in their own money. Colorado errs (Resp. Br. 31) in describing this property right as "the right to bring an equitable claim." It is more than that. It is actual ownership of the money that Colorado is refusing to refund.

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Id.* Colorado's scheme virtually guarantees that defendants like Nelson and Madden will never get their money

back. The risk of an erroneous deprivation approaches 100%. The value of substitute procedural safeguards—most obviously a return to the conventional practice of simply refunding the money—would be enormous, because it would reduce the risk of erroneous deprivation to zero.

Rather than discussing this risk, Colorado discusses (Resp. Br. 31-35) the risk that an innocent defendant will be convicted at trial. But that risk has no relevance to our case. We are not arguing that Colorado should change its trial procedures.

The third *Mathews* factor is "the Government's interest." *Id.* In our case, Colorado has no interest. Colorado does not claim that the money at issue is the state's property. Colorado does not even claim that it has any interest in preventing Nelson and Madden from getting their money back. The only interest Colorado asserts (Resp. Br. 36) is a general interest in comporting "with equitable principles." But Colorado does not explain why equitable principles require the state to keep money that belongs to Nelson and Madden, or why equitable principles require the state to construct a high procedural barrier separating Nelson and Madden from their own property.

III. Colorado's remaining arguments are incorrect.

Colorado devotes the last few pages of its brief to several short arguments, all of which are incorrect.

First, although Colorado denies (Resp. Br. 36) that it is an outlier, Colorado fails to identify any other jurisdiction that requires defendants to prove

their innocence to obtain a refund of monetary payments when a conviction is reversed. To our knowledge, no other jurisdiction has *ever* imposed such a requirement. Rather, as we showed (Pet. Br. 30-35) in our opening brief, and as amicus NACDL shows (NACDL Br. 15-19) in even more detail, the norm today, as in the past, is to refund monetary payments without requiring defendants to prove their innocence—indeed, without requiring defendants to prove anything at all, other than the fact that their convictions were reversed.

Instead, Colorado lists (Resp. Br. 37-38) cases in which refunds have been denied because: (1) the person seeking the refund failed to serve the proper parties, *see* cases cited at Pet. Br. 34 n.13; (2) the person seeking the refund obtained a benefit in exchange for the money, *see* cases cited at Pet. Br. 34 n.13 and *Brantley v. State*, 769 N.E.2d 676, 679-80 (Ind. Ct. App. 2002); or (3) the defendant erroneously used habeas corpus as a vehicle for seeking a refund, *see Minniecheske*, 590 N.W.2d at 19-21. These cases show merely that states may impose reasonable procedural requirements for defendants to seek refunds when their convictions are reversed, and that the value of any benefit the defendant received for his money may be deducted from the refund. These cases certainly do not show that any state employs a scheme anything like Colorado's.

Second, Colorado erroneously denies (Resp. Br. 38-39) the relevance of the long line of cases in which the Court has held that due process requires states to provide a clear and certain remedy for the recovery of money the state has wrongfully withheld. If

taxpayers are entitled to a meaningful procedure for securing refunds of sums collected pursuant to a tax subsequently held unlawful, there is no reason why criminal defendants should not also be entitled to a meaningful procedure for securing refunds of sums collected pursuant to a conviction subsequently held unlawful. It would be very strange if the due process protections for criminal defendants were weaker than those for taxpayers.

Finally, Colorado contends (Resp. Br. 40-42) that money it has collected from Nelson and Madden and then distributed to victims as restitution may not be refunded, because restitution "payments are made to the victim, not the State." Resp. Br. 41. This argument is wrong for two reasons. First, in the absence of a conviction, Nelson and Madden have no obligation to compensate victims. Second, money is fungible. The state cannot avoid refunding the money it has taken from Nelson and Madden, on the ground that it has already given the money to someone else. If avoiding a debt were that easy, few debts would ever be repaid.

When a judgment is reversed, a person who has paid money pursuant to that judgment is entitled to get the money back. The money is her property. That has been the law of the land for centuries. In adopting a rule to the contrary, Colorado has deprived Shannon Nelson and Louis Madden of their property without due process.

CONCLUSION

The judgments of the Colorado Supreme Court should be reversed.

Respectfully submitted,

FRED A. ROWLEY, JR.
DANIEL B. LEVIN
Munger, Tolles & Olson LLP
355 S. Grand Ave.
Los Angeles, CA 90071

DOUGLAS K. WILSON
NED R. JAECKLE
Office of the State Public Defender
1300 Broadway, Ste. 300
Denver, CO 80203

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

SUZAN TRINH ALMONY
P.O. Box 1026
Broomfield, CO 80038